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409-676—70——1

In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN A. LIGUORI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinions of the court of appeals (Appendix A *infra,* pp. 11–30) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1970 (Appendix B, *infra,* p. 31). A petition for rehearing containing a suggestion for *en banc* consideration was denied on August 24, 1970. (Appendices C and D, *infra,* pp. 32–33.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether this Court's ruling in *Leary* v. *United States,* 395 U.S. 6, that the privilege against self-incrimination is a defense to a prosecution under a provision of the Marihuana Tax Act (26 U.S.C. 4744(a)) requires vacation of a negotiated voluntary guilty plea to a charge under that provision entered nine months before *Leary* was decided.

STATUTES INVOLVED

26 U.S.C. 4744(a) provides in pertinent part:

> It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—
>
> (1) to acquire or otherwise obtain any marihuana without having paid such tax, or
>
> (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.
>
> Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

* * * * *

21 U.S.C. 176a provides in pertinent part:

> Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United

States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.

* * * * *

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

* * * * *

STATEMENT

On March 29, 1966, respondent and three co-defendants were indicted in the United States District Court for the Eastern District of New York on charges of smuggling large quantities of marihuana into the United States in violation of 21 U.S.C. 176(a) (counts 1, 2, 4, and 6) and of failing to comply with the Marihuana Tax Act in violation of 26 U.S.C. 4744(a) (counts 3 and 5). At his arraignment on April 14, respondent entered a plea of not guilty to all counts. On the eve of trial, August 19, 1968, respondent's counsel informed the court that he had engaged in discussions with the prosecuting attorney and "we

think we have a disposition." Government counsel told the court that respondent's case could be disposed of by accepting a guilty plea on one of the marihuana tax counts (count 3).[1]

The Court then conducted an inquiry regarding respondent's decision to change his plea to guilty. It informed respondent of his trial rights and the duty of the government to prove guilt beyond a reasonable doubt. The court ascertained that respondent had related to his counsel all of the underlying facts, and had been advised of possible defenses and of the maximum punishment. Count 3 was then read to respondent, and he answered the court's further questions by saying that the plea was voluntary and was made because he was involved in the offense charged. Respondent stated that he was satisfied with his counsel, and defense counsel told the court that he knew of no reason why the plea should not be accepted; in his "legal judgment", respondent was pleading guilty because he was guilty of the offense charged. The plea was then accepted (see Appendix E, *infra,* pp. 34–38); the court reserved consideration of the remaining counts until the sentencing date.

On October 28, 1968, the remaining five counts were dismissed, on motion of the government, and respond-

[1] A conviction as a first offender under 26 U.S.C. 4744(a) (which respondent was) carries with it a term of imprisonment from 2 to 10 years, with parole or probation available immediately. Conviction under 21 U.S.C. 176a carries a term of from 5 to 20 years; probation is not available, and at least one-third of the mandatory minimum term of 5 years must be served before parole is available. See 26 U.S.C. (Supp. V) 7237.

ent was sentenced to imprisonment for five years, to run consecutively to an unrelated sentence he was then serving. On February 27, 1969, the district court, on respondent's motion, reduced the sentence to three years.

On September 2, 1969, relying upon the subsequent decisions in *Leary* v. *United States,* 395 U.S. 6, and *United States* v. *Covington,* 395 U.S. 57,[2] respondent moved to vacate his guilty plea pursuant to 28 U.S.C. 2255. On October 16, 1969, the motion was denied on the ground that by pleading guilty respondent had waived the Fifth Amendment privilege. The court of appeals reversed, holding that the ruling in *Leary* was retroactive even to cases which were final before the date of that decision, and that respondent had not waived the privilege by pleading guilty since at the time of the plea he was unaware that he possessed the right to assert the privilege as a complete defense (Appendix A, *infra* pp. 11–30).

REASONS FOR GRANTING THE WRIT

Holding that the self-incrimination aspect of the ruling in *Leary* v. *United States,* 395 U.S. 6, is fully retroactive, the court below concluded that a guilty plea to a marihuana tax charge nine months before the *Leary* decision had to be vacated, even though the plea was entered knowingly with the advice of com-

[2] In *Leary* and in the companion *Covington* case this Court, on May 19, 1969, held that the privilege against self-incrimination, when timely asserted, provided a complete defense to a charge of violating 26 U.S.C. 4744(a).

petent counsel in a plea bargaining context. The decision below thus raises retroactivity questions upon which the courts of appeals differ. Moreover, the ruling is inconsistent with this Court's recent decisions regarding the effect of a guilty plea.

1. The conclusion of the Court below that respondent's guilty plea is open to collateral attack necessarily depends upon its decision that the *Leary* principle is applicable to convictions which were final when *Leary* was decided. Accordingly, a decision that *Leary* does not reach such final convictions would, without more, dispose of the guilty plea issue posed here and require reversal of the judgment below. Thus, if the Court were squarely to rule in *United States* v. *United States Coin and Currency in the Amount of $8,674, Donald Angelini, Claimant,* No. 5, this Term, or in *Mackey* v. *United States,* No. 36, this Term,[3] that the self-incrimination decisions in *Marchetti* and *Grosso* are not retroactive—at least as to convictions which were final before they were decided—that would presumably resolve the issue against retroactivity in the *Leary* context. In this case, the result would be reinstatement of the conviction obtained by virtue of the guilty plea. However, absent such a direct ruling in *Coin and Currency* or *Mackey,* the retroactivity of *Leary* would still be an open question.

There is conflict among the circuits as to the retro-

[3] *Coin and Currency* was reargued on October 20, 1970, and *Mackey* was argued on October 21, 1970.

activity of *Leary*,[4] and no other case now before the Court poses that precise issue.

2. Even if *Leary* were to be given full retroactive effect that would not be decisive of this case and many others like it which involve guilty pleas. The decision of the court below gives the recent decisions of this Court in the guilty plea area a narrow and strained reading which we believe this Court did not contemplate; the case warrants plenary review also on that basis.

In three cases[5] decided last Term, this Court held that a knowing and intelligent guilty plea entered with the advice of competent counsel may not be sub-

[4] There is likewise a wide divergence of views as to the retroactivity *vel non* of the analogous self-incrimination decisions in *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62; and *Haynes* v. *United States*, 390 U.S. 85.

A compilation of the lower court decisions in this area up to May 1970 is contained in the government's petition for a writ of certiorari in *United States* v. *Lucia*, certiorari pending, No. 186, this Term, and we are providing counsel for respondent with a copy of this petition.

We note here that, besides the Seventh and Eighth Circuit cases cited in our petition in *Lucia*, the Ninth and District of Columbia Circuits have applied *Leary* retroactively. *United States* v. *Ingman*, 426 F. 2d 973 (C.A. 9); cf. *United States* v. *Weber*, 429 F. 2d 148 (C.A. 9), pending on petition for certiorari No. 5927, this Term; *Otey* v. *United States*, 417 F. 2d 559 (C.A.D.C.). The Sixth Circuit has denied retroactive application. *Ramseur* v. *United States*, 425 F. 2d 413; *contra*, *Miller* v. *United States*, 311 F. Supp. 705 (N.D. Ohio). See also *Jordan* v. *United States*, 312 F. Supp. 305 (E.D. Va.), according *Leary* retroactive application.

[5] *Brady* v. *United States*, 397 U.S. 742; *McMann* v. *Richardson*, 397 U.S. 759; *Parker* v. *North Carolina*, 397 U.S. 790.

sequently attacked as having been improvidently entered because the law in effect at the time of the plea has changed.[6] Indeed, in *McMann* v. *Richardson, supra,* 397 U.S. at 773–774, the Court specifically refused to give retroactivity the implications relied on below, holding that the established retroactivity of the rule there in question did not permit the defendant to avoid the consequences of a plea of guilty entered on the basis of "reasonably competent" advice of counsel in open court.[7] 397 U.S. at 777.

This should particularly be true, where, as here, the plea was entered as part of a plea bargaining arrangement; such a procedure was recognized in *Brady* as constitutionally permissible where not imposed (as it was clearly not here) through pressures from the

[6] As this Court put the matter in *Brady*, *supra*, 397 U.S. at 757: "We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought * * *."

[7] In *McMann* v. *Richardson*, the Court thus rejected the argument that since *Jackson* v. *Denno*, 378 U.S. 368, had been applied retroactively to defendants who had been previously convicted, a defendant who pleaded guilty prior to that decision was also entitled to a hearing on voluntariness. The Court stated (397 U.S. at 773): "The defendant who pleads guilty is in a different posture. He is convicted on his counseled admission in open court that he committed the crime charged against him. The prior confession is not the basis for the judgment, has never been offered in evidence at a trial, and may never be offered in evidence." Compare Mr. Justice Brennan's dissenting opinion at 397 U.S. 783–784.

prosecutor or the court. See 397 U.S. at 750–752. It would, in our judgment, be wholly anomalous to adopt a rule which would permit the respondent to "assert the benefit of his bargain and avoid entirely the reciprocal burden" which he knowingly agreed to accept (see Judge Lumbard's concurring opinion, Appendix A, *infra,* p. 28).[8] In this respect, the decision below is in conflict with the recent decision of the Ninth Circuit in *United States* v. *Weber,* 429 F. 2d 148, pending on petition for certiorari No. 5927, this Term.

Accordingly, even if *Leary* is deemed to apply retroactively to final convictions obtained after trial, the court below erred, we submit, in setting aside a guilty plea entered knowingly after full consultation with competent counsel.

---

[8] The majority below (Appendix A *infra*, p. 25 n. 3) misconceived the government's position in concluding that plea bargaining was not involved in this case. While no claim to that effect was specifically asserted in the government's brief in the court of appeals, the facts adduced at the time of the plea made it evident that such bargaining was involved. See Statement, *supra*, pp. 3–4. And, as Judge Lumbard correctly pointed out in his concurring opinion "[t]here can be no doubt that a bargain was reached in this case" and that respondent "benefited greatly from the arrangement" (Appendix A *infra*, p. 28).

As the government pointed out in its petition for rehearing, it had no need to rely upon the presumption contained in 21 U.S.C. 176a, to sustain respondent's convictions had he gone to trial on the counts under that section, since an informant was prepared to testify that respondent knew that the large quantities of marihuana involved in this case came from Mexico. The informant—who is now a fugitive from justice—so testified at the trial of co-defendants a few days after respondent's plea had been accepted.

3. In view of the fact that the guilty plea issue is intertwined with the retroactivity question, we suggest that it might be appropriate to defer action on this petition to await decisions in the retroactivity cases now pending (*Coin and Currency* and *Mackey*). Depending on the rulings in those cases, the present case may be disposed of summarily or may require more extended consideration on one or both of its aspects.

Respectfully submitted.

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NOVEMBER 1970.

APPENDIX A

United States Court of Appeals for the Second Circuit

No. 670—September Term, 1969

(Argued June 3, 1970 Decided July 17, 1970.)

Docket No. 34516

UNITED STATES OF AMERICA, APPELLEE,

v.

JOHN A. LIGUORI, APPELLANT.

Before: LUMBARD, *Chief Judge*, SMITH and KAUFMAN, *Circuit Judges*.

Appeal from denial in the United States District Court for the Eastern District of New York, Manuel Real, *Judge*,* of motion under 28 U.S.C. § 2255 to vacate conviction and sentence on plea of guilty to violation of 26 U.S.C. § 4744(a). Reversed.

DANIEL H. GREENBERG, New York, N.Y., *for Appellant*.
JEROME C. DITORE, Asst. U.S. Attorney (Edward R. Neaher, United States Attorney for the Eastern District of New York, Joseph W. Ryan, Jr., Asst. U.S. Attorney, of counsel), *for Appellee*.

SMITH, *Circuit Judge*:

On March 29, 1966, appellant Liguori and three co-defendants were indicted on six counts arising out of

* District Judge for the Central District of California, sitting by designation.

their acquisition, possession and concealment of 23.361 kilograms of marihuana. Count numbers three and five charged appellant with knowingly and unlawfully acquiring marihuana without paying the required transfer tax, in violation of 26 U.S.C. § 4744(a). The other counts charged conspiracy and violations of 21 U.S.C. § 176a (concealing and dealing in marihuana known to have been smuggled into the United States). He pleaded not guilty to all counts on April 14, 1966.

More than two years later, on the eve of trial, August 19, 1968, Liguori changed his plea to guilty on count number three. On October 29, 1968, Judge Manuel Real, United States District Judge for the Central District of California, sitting in the District Court for the Eastern District of New York, sentenced Liguori to five years imprisonment, to run consecutively with an unrelated sentence he was then serving. On the same day, on motion by the Assistant United States Attorney, Judge Real dismissed the charges against Liguori in counts one, two, four, five and six.

On Liguori's motion, Judge Real, February 27, 1969, reduced the sentence to three years imprisonment to run consecutively with the unrelated sentence. No appeal was taken.

On May 19, 1969 the Supreme Court decided *Leary* v. *United States,* 395 U.S. 6 (1969), which held that a timely assertion of the privilege against self-incrimination is a complete defense to prosecution under 26 U.S.C. § 4744(a) for obtaining marihuana without having paid the transfer tax required by 26 U.S.C. § 4741(a).

Thereafter on September 2, 1969, Liguori filed a motion to the sentencing court pursuant to 28 U.S.C. §2255 to vacate his conviction and sentence on the ground that his fifth amendment privilege against self-

incrimination under the *Leary* decision precluded his punishment under 26 U.S.C. § 4744(a). On October 16, 1969, Judge Real denied the motion without a hearing, holding that Liguori's guilty plea, entered with the assistance of counsel and with awareness of the nature of the offense and consequences of the plea, waived any claim he might have to applicability of the *Leary* decision to his conviction. From this decision, Liguori appeals.[1]

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[1] The disposition of the charges against the three co-defendants is an interesting contrast. Defendant Custodio pleaded guilty to count three on August 20, 1968 and was sentenced to six years imprisonment.

Defendants Rosa and Gonzalez went to trial on all six counts on August 26, 1968. The jury on August 30, 1968, acquitted Gonzalez on all charges and found Rosa guilty of all charges. On October 29, 1968, the same day Liguori was sentenced, Rosa was sentenced to eight years on each of the first five counts to run concurrently, and three years on count number six to run consecutively with counts one, two and four.

Rosa appealed his conviction to this court. While his appeal was pending, the Supreme Court decided *Leary*. Rosa's brief on appeal for the first time asserted the privilege against self-incrimination as a bar to his conviction under the tax counts (three and four), and challenged his convictions on the remaining counts since they were based on the presumption of 21 U.S.C. § 176a which was held unconstitutional in *Leary*.

The Assistant United States Attorney stipulated that Rosa's case should be remanded to the district court in accord with the *Leary* decision and this court ordered the remand. *United States* v. *Rosa*, Docket No. 33176 (2d Cir. September 10, 1969). On remand the government simply consented to the dismissal of the entire indictment which was ordered by Judge Weinstein of the District Court for the Eastern District of New York on November 14, 1969. As to the counts based on 21 U.S.C. § 176a, *Leary's* invalidation of that section's presumption would seem only to require a new trial, not the dismissal of the indictment. See note 3, *infra*.

Since we find that Leary should be given retroactive application (as to that portion dealing with the privilege against self-incrimination), that Liguori's assertion of the privilege on collateral attack was timely, and that his guilty plea did not waive his privilege against self-incrimination, we reverse the order of the district court.

The Supreme Court in *Leary,* following its analogous treatment of the gambling taxes in *Marchetti* v. *United States,* 390 U.S. 39 (1968) and *Grosso* v. *United States,* 390 U.S. 62 (1968) and the registration requirement under the National Firearms Act in *Haynes* v. *United States,* 390 U.S. 5 (1968), refused to hold that 26 U.S.C. § 4744 requiring a transferee of marihuana to pay a tax is unconstitutional. Instead it ruled that a timely assertion of the privilege against self-incrimination is an absolute defense to prosecution under that section. Thus the statute continues to be viable and prosecutions under it could be successful if, for instance, a corporation acquired marihuana without paying the transfer tax, since a corporation is not entitled to assert the privilege against self-incrimination.[2] See *George Camp-*

[2] Similarly, under *Marchetti*, punishment for failing to file and pay gambling taxes might be sustained against a defendant from a state where gambling is not prohibited whose compliance with the statute would not subject the defendant to a substantial risk of self-incrimination.

In addition, an accused charged on several counts including concealing marihuana under 21 U.S.C. § 176a and acquiring marihuana without paying the transfer tax under 26 U.S.C. § 4744(a) may be offered a plea bargain under which he could plead guilty to the tax count alone. Since section 4744(a) carries a lower range of possible sentences, and since first offenders under section 4744(a) are not ineligible for parole and probation as are first offenders under section 176a, see 26 U.S.C. § 7237, such an accused may knowingly and expressly waive his

bell Painting Corp. v. *Reid,* 392 U.S. 286, 288–89 (1968). Except for such unique situations "we believe the effect of the Supreme Court decision [in *Leary*] is to prevent enforcement of the [provisions of the Marihuana Tax Act, 26 U.S.C. § 4744(a)] as they are now designed because of the 'substantiality of the risks of incrimination.'" *United States* v. *Manfredonia,* 391 F.2d 229, 230 (2d Cir. 1968) (discussing the effect of *Marchetti* and *Grosso*).

In the present case we must decide whether *Leary* should be given retroactive effect to defendants whose convictions have become final before the Supreme Court rendered that decision, May 19, 1969, and whether appellant here has waived his defense based on the privilege by pleading guilty, or has raised his defense in an untimely fashion.

I. Retroactivity

This court has not yet considered whether to give retroactive effect to *Leary,* as applied to convictions which were final before that decision, or to the analogous decisions in *Marchetti, Grosso and Haynes, supra.* See *Desimone* v. *United States,* —— F.2d ——, Docket No. 33421, Slip Op. 2677, 2679 (2d Cir. May 1, 1970) (specifically avoiding the question of the retroactivity of *Haynes;* Judge Bonsal, dissenting, said he would apply *Haynes* retroactively). Only four other circuits have addressed the problem of the retroac-

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defense of the privilege against self-incrimination to the section 4744(a) count in order to limit his conviction to this count and thereby minimize the possible severity of his punishment.

Finally, as suggested by the Court in *Leary,* if the accused's failure to pay the transfer tax was not at all motivated by his fear of possible incrimination, then *Leary* may be no bar to his prosecution under 26 U.S.C. § 4744(a). *Leary* v. *United States* 395 U.S. 6, 28–29 (1969).

tivity of *Leary*. *Ramseur* v. *United States*, No. 18,824, —— F.2d —— (6 Cir. April 8, 1970) (holding *Leary* is mostly prospective); *United States* v. *Santos*, 417 F.2d 340 (7 Cir. 1969) (holding *Leary* is retroactive), *vacated on other grounds*, 397 U.S. 46 (February 24, 1970); *United States* v. *Scardino* 414 F.2d 925 (5 Cir. 1969) (assuming that *Leary* is not retroactive, nevertheless held that *Leary* applied to Scardino since his sentence had not been finally ordered); *Rowell* v. *United States*, 415 F.2d 300 (8 Cir. 1969) (holding *Leary* is retroactive), *remanded on other grounds*, 90 S. Ct. 1407 (April 27, 1970). See *Miller* v. *United States*, 311 F. Supp. 705, 709–711 (N.D. Ohio 1970) (holding *Leary* is retroactive); *United States* v. *King*, 307 F. Supp. 217 (S.D. Cal. 1969) (dictum that *Leary* is retroactive); contra, *Barrett* v. *United States*, 300 F. Supp. 1060, 1062 (D. Minn. 1969) (*Leary* is not retroactive).

On the analogous question of the retroactivity of *Marchetti*, *Grosso* and *Haynes*, the other circuits are divided, all but one holding in favor of retroactivity. *Meadows* v. *United States*, 420 F.2d 795 (9 Cir. 1969) (*Haynes* retroactive), *petition for certiorari filed*, 38 U.S.L.W. 3391 (February 20, 1970); *United States* v. *Lucia*, 416 F.2d 920 (5 Cir. 1969) (*Marchetti* retroactive); *United States* v. *Miller*, 406 F.2d 1100 (4 Cir. 1969) (*Haynes* retroactive); *Graham* v. *United States*, 407 F.2d 1313 (6 Cir. 1969) (*Marchetti* not retroactive). See *Horton* v. *United States*, 300 F. Supp. 1332 (D. Conn. 1969); *Stoney* v. *United States*, 302 F. Supp. 145 (E.D. Mo. 1968); *Desimone* v. *United States*, 303 F. Supp. 406 (D. Conn. 1968) (alternate holding), *affirmed on other grounds*, —— F.2d —— (2d Cir. May 1, 1970), all holding that *Haynes* is not retroactive. Cf. *Forgette* v. *United States*, 390 U.S.

203 (1968); *Deckard* v. *United States,* 381 F.2d 77 (8 Cir. 1967) (Blackmun, *C.J.*).

The Supreme Court has established three criteria for deciding which new constitutional rules should be given only prospective effect: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno,* 388 U.S. 293, 297 (1967). The most important of the criteria is the purpose of the new constitutional rule, *Desist* v. *United States,* 394 U.S. 244, 249 (1969). In addition, if the new rule affects "the very integrity of the fact-finding process" then it should be given retroactive effect. See *Linkletter* v. *Walker,* 381 U.S. 618, 638–639 (1965).

Under this test, we conclude that the portion of *Leary* holding that the privilege against self-incrimination is a complete defense to a prosecution under section 4744(a) should be given retroactive effect. The purpose of the rule announced in *Leary* is to safeguard the fifth amendment privilege against self-incrimination. In the context of the Marihuana Tax Act which requires payment of the transfer tax upon acquisition of marihuana, the privilege is "the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act." *Leary* v. *United States,* 395 U.S. 6, 28 (1969). This purpose of the rule, therefore, cannot be furthered by the continued punishment of persons who were convicted prior to the *Leary* decision for failing to comply with the statute which required an incriminatory act. See *United States* v. *Lucia,* 416 F.2d 920, 925 (5 Cir. 1969).

Indeed, the purpose of protecting the privilege against self-incrimination, by prohibiting punishment for refusing to incriminate oneself, is served by retroactive application of *Leary* to terminate present punishment for a past refusal. We are not faced here with a rule whose purpose is to deter future conduct by law enforcement officials, which purpose is not furthered by retroactive application. *Desist* v. *United States,* 394 U.S. 244 (1969); *Fuller* v. *Alaska,* 393 U.S. 80 (1968); *Linkletter* v. *Walker,* 381 U.S. 618 (1965); see *Halliday* v. *United States,* 394 U.S. 831 (1969).

Nor is any justified reliance by law enforcement officials or prosecutors upset by retroactive application of *Leary.* This is not an instance where the conduct of pre-trial proceedings and investigations or prosecutorial trial tactics would have been different had the *Leary* rule been in effect at the time. See, e.g., *Stovall* v. *Denno,* 388 U.S. 293 (1967); *Johnson* v. *New Jersey,* 384 U.S. 719 (1966); *Tehan* v. *United States ex rel. Shott,* 382 U.S. 406 (1966). Had the *Leary* rule been in effect, there could have been no prosecution of Liguori for the crime with which he was charged. Thus the government could not have obtained the conviction of Liguori by modifying its pre-trial activities, the evidence it presented at trial, or its summation, or by requesting a different charge to the jury. Thus, although the government did rely on its ability to obtain a valid conviction under section 4744(a), it did not rely to its detriment. Even if the *Leary* rule had been known at the time, the government would have been in no better position to convict Liguori than it is now; a timely assertion of the privilege would have prevented any prosecution.

Similarly, the retroactive application of *Leary* will not have the adverse effect on the administration of

justice which was avoided in such cases as *Johnson* v. *New Jersey* and *Linkletter* v. *Walker, supra.* Since retroactive application of *Leary* will completely bar any further prosecution, the government will not be burdened with the dilemma of either retrying large numbers of guilty persons with aged or dissipated evidence or permitting the release of such persons when there is a governmental interest in their continued punishment. *Meadows* v. *United States,* 420 F.2d 795, 799 (9 Cir. 1969), *petition for certiorari filed,* 38 U.S. L.W. 3391 (February 20, 1970); see *Miller* v. *United States,* 311 F. Supp. 705, 710 (N.D. Ohio 1970). The rule announced in *Leary* vitiates any governmental interest in the continued punishment of persons in violation of their fifth amendment privilege against self-incrimination. See *United States* v. *Lucia,* 416 F.2d 920, 926 (5 Cir. 1969); *United States* v. *Miller,* 406 F.2d 1100, 1104 (4 Cir. 1969).

To be sure, the rule announced in *Leary* does not go to "the very integrity of the fact-finding process," *Linkletter* v. *Walker, supra,* 381 U.S. at 638–639, but it affects a decision more fundamental than the fact-finding process—whether the government may punish a man under this statute, even if the facts reliably establish a violation. See *United States* v. *Lucia,* 416 F.2d 920, 926 (5 Cir. 1969).

We are not, therefore, convinced by the reasoning in *Graham* v. *United States,* 407 F.2d 1313 (6 Cir. 1969). We decline to follow *Ramseur* v. *United States,* No. 18,824, —— F.2d —— (6 Cir. April 8, 1970), and we hold that the portion of *Leary* dealing with the privilege against self-incrimination should be given retroactive effect. Compare, *United States* v. *Jenkins,* Docket No. 33742, Slip Op. 2881, 2882 (2d Cir. May 14, 1970) (presumed that invalidity of presumption of importation is retroactive); *United States* v. *Scott,*

425 F.2d 55 (9 Cir. March 6, 1970) (*en banc*) (portion of *Leary* dealing with the presumption of importation is retroactive); accord, *Rivas* v. *United States*, No. 70 Civ. 411 (S.D.N.Y. March 19, 1970), *appeal docketed*, Docket No. 34834 (2d Cir. May 25, 1970). Cf. *United States* v. *Sorenson*, No. 69 Civ. 975 (E.D. N.Y. January 27, 1970).

II. Timeliness and Waiver

The Court in *Leary*, as in *Marchetti*, *Grosso* and *Haynes*, held that in order for the privilege to be a complete defense to prosecution under section 4744(a) it must be asserted in a timely fashion and it must not be waived. 395 U.S. at 27; *United States* v. *Covington*, 395 U.S. 57, 59 (1969). We consider first whether Liguori's assertion of the privilege was timely.

At the time Liguori pleaded guilty, August 19, 1968, only two courts had considered whether *Marchetti*, *Grosso* and *Haynes* (decided on January 29, 1968) would permit prosecutions under section 4744(a) over an assertion of the privilege against self-incrimination. *Leary* v. *United States*, 392 F.2d 220 (March 29, 1968) (*en banc*) (privilege is no defense), *cert. granted*, June 10, 1968; *United States* v. *Covington*, 282 F. Supp. 886 (S.D. Ohio March 27, 1968) (privilege is a defense). Under these circumstances Liguori cannot be faulted for failing to anticipate the action of the Supreme Court. *Otey* v. *United States*, 417 F.2d 559, 561 (D.C. Cir. 1969); *Rowell* v. *United States*, 415 F.2d 300 (8 Cir. 1969), *remanded on other grounds*, 90 S. Ct. 1407 (April 27, 1970); *United States* v. *Santos*, 417 F.2d 340, 345 (7 Cir. 1969), *vacated on other grounds*, 397 U.S. 46 (1970); see *United States* v. *Lopez*, 414 F.2d 272, 273 (2d Cir. 1969) (per curiam); *Meadows* v. *United States, supra;*

United States v. *Lucia, supra; United States* v. *Miller, supra;* but see *Sepulveda* v. *United States,* 415 F.2d 321 (10 Cir. 1969); *United States* v. *Carlisle,* 303 F. Supp. 627 (W.D. Okla. 1969); cf. *Stoney* v. *United States,* 302 F. Supp. 145 (E.D. Mo. 1968).

In *Grosso* v. *United States,* 390 U.S. 62 (1968) petitioner failed to assert at trial or before the Supreme Court the privilege as a defense to charges based on his failure to pay the occupational tax. Since the case law at the time had rejected such a defense, the Supreme Court held that his conviction on these charges should be reversed despite his total failure to assert the privilege. In similar circumstances, we have held that a plea of the privilege for the first time on appeal is timely when the trial took place prior to the Supreme Court's decision. *United States* v. *Lopez,* 414 F.2d 272, 273 (2d Cir. 1969) (per curiam); *United States* v. *Manfredonia,* 391 F.2d 229 (2d Cir. 1968) (per curiam); accord, *United States* v. *Whitehead,* 424 F.2d 446, 448 (6 Cir. March 3, 1970) (*en banc*); *Otey* v. *United States,* 417 F.2d 559, 561 (D.C. Cir. 1969); *Becton* v. *United States,* 412 F.2d 1005, 1007 (8 Cir. 1969) (Blackmun, *C.J.*); *Shoffeitt* v. *United States,* 403 F.2d 991 (5 Cir. 1968); *Drennon* v. *United States,* 393 F.2d 342 (8 Cir. 1968). In *Leary* itself, petitioner first asserted the privilege after the completion of the trial on motion for a new trial. And in *Forgette* v. *United States,* 390 U.S. 203 (1968), the Supreme Court on petition for hearing, reversed its previous 1966 denial of a petition for certiorari, granted certiorari, and vacated judgment and remanded on the authority of *Haynes.* The successful defense based on *Haynes* was thus first asserted after certiorari had been denied.

It would seem that the Supreme Court's requirement that the privilege be timely asserted was pri-

marily designed to insure that in future cases the accused will assert his defense of the privilege before time and resources are wasted on a trial. We cannot conclude that the purpose of the timeliness requirement would be served by holding that Liguori's assertion of the privilege was untimely, when at the time of his conviction, the *Leary* defense had not been established by the Supreme Court. *Ramseur* v. *United States,* No. 18,824, —— F.2d ——, slip at 4 (6 Cir. April 8, 1970); *Miller* v. *United States,* 311 F. Supp. 705, 708–709 (N.D. Ohio 1970). Liguori's motion for relief under section 2255 (on September 2, 1969) was filed within four months of the Supreme Court's decision in *Leary.*

Finally we must consider whether Liguori waived his privilege against self-incrimination by pleading guilty. The court below so held. Other courts considering the question, under *Leary,* or *Marchetti, Grosso,* or *Haynes, supra,* for the most part have found that a guilty plea is not a waiver of the privilege in cases of this nature. *Meadows* v. *United States, supra,* 420 F.2d at 797; *United States* v. *Lucia, supra,* 416 F.2d at 923; *United States* v. *Miller, supra,* 406 F.2d at 1105; *Desimone* v. *United States,* —— F.2d ——, Docket No. 33421, Slip Op. 2677 at 2691 (2d Cir. May 1, 1970) (dissenting opinion); *Miller* v. *United States,* 311 F. Supp. 705, 709 (N.D. Ohio 1970); see *United States* v. *Scardino,* 414 F.2d 925, 927 (5 Cir. 1969) (dictum); *United States* v. *King,* 307 F. Supp. 217, 218 (S.D. Cal. 1969) (dictum); contra, *Eby* v. *United States,* 415 F.2d 319 (10 Cir. 1969) (per curiam).

By pleading guilty here, Liguori admitted that he had failed to comply with the transfer tax provisions of section 4744(a). He thereby waived his right to

trial and his privilege to remain silent as to whether he failed so to comply. *McMann* v. *Richardson*, —— U.S. ——, 90 S. Ct. 1441, 1446 (May 4, 1970). But he did not intentionally relinquish his known right not to be punished for failing to comply with a statute which required him to incriminate himself. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). This is especially true since at the time he pleaded guilty, before the *Leary* decision, he could not have known that he possessed that right. See *United States* v. *Whitehead*, 424 F.2d 446, 448 (6 Cir. March 3, 1970) (*en banc*); *Otey* v. *United States*, 417 F.2d 559, 561 (D.C. Cir. 1969).

Nor is this situation controlled by the recent decisions of the Supreme Court in *McMann* v. *Richardson*, —— U.S. ——, 90 S. Ct. 1441 (May 4, 1970); *Parker* v. *North Carolina*, —— U.S. ——, 90 S. Ct. 1458 (May 4, 1970); *Brady* v. *United States*, —— U.S. ——, 90 S. Ct. 1463 (May 4, 1970). In those cases the Court held that a guilty plea is not involuntary if it is based on competent contemporary advice of counsel as to admissibility of a confession or as to the validity of a possible death sentence after conviction by a jury, even if subsequent Supreme Court decisions render the confession inadmissible or the possible death sentence invalid.

The Court in those cases relied heavily on the fact that when a petitioner pleaded guilty, he admitted in open court that he committed the charged crime. Moreover the Court felt that it would be too difficult to determine years later the magnitude of the effect of petitioner's fear of his confession or the death sentence on the petitioner's original decision to plead guilty. And the Court was apparently concerned with the burden on the states of having to permit reopen-

ing of countless guilty pleas to a variety of charges which only became open to challenge due to subsequent changes in the law.

The instant case does not fall within those concerns. First of all, we are not considering here as in *Richardson* v. *McMann, supra, et al.,* whether Liguori's plea was voluntary. Liguori has not claimed that his plea was involuntary. Rather, we consider here whether Liguori when he pleaded guilty intended to waive his defense under *Leary* even before that decision was rendered. We think that he did not. See *United States* v. *Lucia,* 416 F.2d 920, 923 (5 Cir. 1969).

Second, although Liguori admitted in open court that he violated section 4744(a), this does not, unlike in *Richardson, et al.,* establish that there is a governmental interest in his punishment. In this case, it is the statutory scheme imposing punishment for failing to incriminate oneself which violates the privilege against self-incrimination, so that even if the procedures leading to the conviction were correct the punishment here, unlike in *Richardson, et al.,* is unjustified.

Third, there is no difficulty now in determining whether Liguori would have pleaded guilty had the *Leary* rule been in effect at the time. Since *Leary* and the privilege would have provided a complete defense to prosecution, we are not faced with an accused's decision to plead guilty based on difficult judgments as to the strength of the government's case and as to the possibility of leniency. *McMann* v. *Richardson, supra,* 90 S. Ct. at 1448. In this case Liguori certainly would not have pleaded guilty had he known

of his right to assert the privilege as a complete defense.[3]

Finally, by permitting Liguori's defense founded on his privilege against self-incrimination, despite his plea of guilty, we do not jeopardize valid convictions on a wide variety of state and federal charges as was feared in ***Richardson*** v. ***McMann, supra, et al.*** Here we only permit the defense of privilege to be asserted by prisoners who pleaded guilty to a single federal offense, when the federal government has no valid interest in the continued punishment of those prisoners for that offense. See *United States* v. *Miller,* 406 F. 2d 1100, 1104 (4 Cir. 1969).

III. Disposition

Since we have found that Liguori has timely asserted his privilege against self-incrimination and that he did not waive his privilege by pleading guilty

[3] The government does not contend that Liguori pleaded guilty to count three to avoid the harsher minimum penalties on other counts, see note 2, *supra*, and would have been willing to so plead even if he had known of his complete defense under *Leary*. Such a contention would be unlikely in these circumstances since on the other counts the government apparently had to rely on the presumption of knowledge of importation under 21 U.S.C. § 176a in order to prove knowledge of importation. When this presumption was invalidated by *Leary*, the government consented to the dismissal of the indictment against codefendent Rosa. See note 1, *supra*. Had the government been able to prove knowledge of importation without the use of the section 176a presumption, then it is unlikely that it would have consented to the dismissal of Rosa's case when it could have obtained his conviction in a new trial. So had *Leary* been decided prior to Liguori's guilty plea, Liguori would not have pleaded guilty to any count.

prior to the *Leary* decision, we reverse the decision of the court below and remand with directions to vacate the judgment of conviction.[4] There is no question here that "possession of marihuana was illegal under [New York] law, and that [Liguori] would have run a substantial risk of incrimination had he complied with the Act. We conclude that there is no possibility of any factual dispute with regard to the hazard of incrimination." *United States* v. *Covington,* 395 U.S. 57, 61 (1969).

Reversed and remanded. Mandate may issue forthwith.

LUMBARD, *Chief Judge* (concurring):

Although I concur in the majority opinion and agree with the result reached, see *United States* v. *Lopez,* 414 F.2d 272 (2d Cir. 1969), the troublesome

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[4] As the concurring opinion suggests, the government may seek to reindict Liguori on the five counts of the previous indictment which were dismissed after he pleaded to the tax count. Whether reindictment would be barred by the double jeopardy clause or by estoppel effects arising from the apparent plea bargain need not be considered at this time, particularly in view of the conflict in authority. Compare, *United States* v. *Tatio,* 216 F. Supp. 850, 852 (S.D.N.Y. 1963) (kidnapping count), *rev'd on other grounds* 377 U.S. 463 (1964); *United States* v. *Paiva,* 294 F. Supp. 742, 745–48 (D.D.C. 1969), with *United States* v. *Potishman,* 230 F.2d 271, 273–74 (5 Cir.), *cert. denied,* 351 U.S. 918 (1956); *District of Columbia* v. *Buckley,* 128 F.2d 17, 20 (D.C. Cir. 1942); *Buie* v. *United States,* 76 F.2d 848, 849 (5 Cir.), *cert. denied,* 296 U.S. 585 (1935). Cf. Note, *Double Jeopardy: The Reprosecution Problem,* 78 Harv. L. Rev. 1272, 1275076 (1964); *Klopfer* v. *State of North Carolina,* 386 U.S. 213, 219–20 & n. 5 (1967); *United States* v. *Ford,* 99 U.S. (9 Otto) 594, 601 (1878); *White* v. *United States,* 377 F.2d 948, 949 (D.C. Cir. 1967); *Mann* v. *United States,* 304 F.2d 394, 397 (D.C. Cir.), *cert. denied,* 371 U.S. 896 (1962); *Robinson* v. *United States,* 284 F.2d 775, 776–77 (5 Cir. 1960).

nature of this case prompts me to add several comments.

Liguori, together with Henry Rosa, Luis Custodio and Eli Samuel Gonzalez, was charged in a six count indictment with possession, sale, and distribution of marihuana and with conspiracy to do the same.[1] Liguori pleaded guilty to count three charging him with failure to pay the transfer tax on 52 lbs. of marihuana, in violation of 266 U.S.C. § 4744(a), under which the penalties are not less than two to not more than ten years, a fine up to $20,000, and the possibility of probation after serving the minimum two years. Liguori was also charged with four counts of selling and distributing marihuana in violation of 21 U.S.C. §176(a), the penalties for which are not less than five years to not more than twenty years, a fine of $20,000, and no eligibility for probation until the minimum five years has been served. See 26 U.S.C. §7237. The four counts charging violations of §176(a), counts one, two, four

[1] Liguori was indicted on six counts:

(1) on or about January 26, 1966, receiving, concealing and facilitating the transportation of 23.361 kilograms (approx. 52 lbs.) of marihuana, in violation of 21 U.S.C. § 176(a);

(2) on or about January 26, 1966, selling 23.361 kilograms of marihuana, in violation of 21 U.S.C. § 176(a);

(3) on or about January 26, 1966, obtaining 23.361 kilograms of marihuana without paying the transfer tax, in violation of 26 U.S.C. § 4744(a);

(4) on or about January 26, 1966, concealing 2.949 kilograms (approx. 6½ lbs.) of marihuana, in violation of 21 U.S.C. § 176(a);

(5) on or about January 26, 1966, obtaining 2.949 kilograms of marihuana without paying the transfer tax, in violation of 26 U.S.C. § 4744(a);

(6) on or about January 24 and 26, 1966, conspiring to do the above, in violation of 21 U.S.C. § 176(a).

and six, as well as an additional count charging a further violation of §4744(a), count five, were dismissed after the guilty plea to count three was taken. As a consequence. Liguori actually received a three year sentence on count three, which is significantly less than if he had been convicted on any one of counts one, two, four or six, which carried the mandatory minimum sentence of five years without eligibility for probation until the five years had been served.

Relying on *Leary* v. *United States,* 395 U.S. 6 (1969), Liguori now attempts to have his conviction after a guilty plea reversed. I would have little hesitation in arriving at the result we reach today if *Leary, supra,* had simply declared 26 U.S.C. §4744(a) to be unconstitutional, in which case Liguori would have entered a plea to a count which did not charge a crime. Although the statute has been significantly emasculated, it is not completely void. As the majority notes, a corporation could still be convicted under the statute, and the privilege can be knowingly and intelligently waived. As a result, Section 4744(a) retains a certain value in a plea bargaining situation. See footnote 2, majority opinion. It is this point regarding plea arrangement that I find most troublesome.

There can be no doubt that a bargain was reached in this case and that Liguori, by pleading to count three and securing the dismissal of all the other counts, benefited greatly from the arrangement. That he can now assert the benefit of his bargain and avoid entirely the reciprocal burden was certainly not within the contemplation of the court or the parties.

In such a situation there appears to be every reason to permit the government either to re-indict Liguori on the other counts, or to move in the district court to vacate the dismissal of the other counts. If the

government elects to continue with the prosecution of Liguori it must do so promptly, as the acts charged occurred more than four years ago and the running of the statute of limitations will soon become a bar to any further prosecution. In the event the government does continue the prosecution, I do not think that the defense of double jeopardy will be a bar. See *United States* v. *Chase,* 372 F.2d 453 (4th Cir. 1967); *Robinson* v. *United States,* 284 F.2d 775 (5th Cir. 1960); *Hensley* v. *United States,* 160 F.2d 257 (D.C. Cir.), cert. denied, 331 U.S. 817 (1947).

The majority assumes in footnote 3 that the charges against Liguori cannot be proved because the charges against a co-defendant were dismissed with the consent of the government after *Leary, supra.* It does not follow, however, that the evidence against Liguori is insufficient to make out a case on one or more of the five counts which were dismissed. Based on the overt acts alleged in the conspiracy count of the indictment, Liguori may well have been the ringleader of the entire operation. He is alleged to have made two different telephone calls to buyers and on another occasion he allegedly met with two buyers to negotiate the terms of delivery and sale of the marihuana. None of the other defendants is alleged to have made any telephone calls and their participation in the scheme seems to have been less central than Liguori's. These factors would seem to be a strong indication that Liguori had actual knowledge of the source of the marihuana he was distributing. In any event, the mere fact that the charges were dropped against a co-defendant is in no way indicative of the quantum of proof that may exist against Liguori.

The purpose of a guilty plea is to resolve and settle issues with finality, and only in exceptional circumstances will the disposition after a guilty plea be sub-

ject to review on appeal. A defendant is still bound by his guilty plea and conviction even though he might have pleaded differently had later decided cases then been the law. *McMann* v. *Richardson,* —— U.S. ——, 90 S. Ct. 1441 (May 4, 1970). In *Brady* v. *United States,* —— U.S. ——, 90 S. Ct. 1463 (May 4, 1970) the Court further indicated that

> "[A]bsent misrepresentation or other impermissible conduct by state agents, cf. Von Moltke v. Gillies, 332 U.S. 708, 68 S. Ct. 316, 92 L. Ed. 309 (1948), a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." at 1473.

The Court continued, saying

> "We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought. . . ." at 1474.

In Liguori's case however, the development is not merely that the government would have a weaker case against him, but that it would have no case against him. As is pointed out in the majority opinion, the government no longer has any proper interest in punishing Liguori for his failure to incriminate himself. Such reasoning does not apply to the serious charges brought against Liguori under 21 U.S.C. § 176(a). The government has every legitimate and proper interest in punishing those who on a commercial scale distribute and sell narcotics, knowing the same to have been imported.

APPENDIX B

United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of July one thousand nine hundred and seventy.

Present: HON. J. EDWARD LUMBARD, *Chief Judge,* HON. J. JOSEPH SMITH, HON. IRVING R. KAUFMAN, *Circuit Judges.*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JOHN A. LIGUORI, DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded in accordance with the opinion of this court with costs to be taxed against the appellee.

A true copy,

A. DANIEL FUSARO,
Clerk.

VINCENT A. CARLIN,
Chief Deputy Clerk.

APPENDIX C

34516

United States Court of Appeals, Second Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JOHN A. LIGUORI, DEFENDANT-APPELLANT.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

J. EDWARD LUMBARD,
J. JOSEPH SMITH,
J. Joseph Smith,
Irving R. Kaufman (per JJS),
Circuit Judges.

IRVING R. KAUFMAN.

AUGUST 24, 1970.

APPENDIX D

34516

United States Court of Appeals, Second Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JOHN A. LIGUORI, DEFENDANT-APPELLANT.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
Chief Judge.

AUGUST 24, 1970.

APPENDIX E

66 CR 148

United States District Court

Eastern District of New York

UNITED STATES OF AMERICA,
against
JOHN A. LIGUORI, *Defendant.*

United States Courthouse
Brooklyn, New York
August 19, 1968
10:00 o'clock A.M.

Before: HONORABLE MANUEL REAL, *U.S.D.J.*

MICHAEL PICOZZI,
Official Court Reporter.

Appearances:

JOSEPH P. HOEY, ESQ.
United States Attorney
For the Eastern District of New York

By: RAYMOND B. GRUNEWALD, ESQ.
Assistant U.S. Attorney

ABRAHAM NATHANSON, ESQ.
Attorney for Defendant

The COURT: Are you ready, gentlemen?

Mr. NATHANSON: May we approach the bench? My name is Abraham Nathanson and I represent the Defendant Liguori.

I have had discussions with the Assistant United States Attorney, Mr. Grunewald, who is in charge of this case and Mr. O'Brien, and we think we have a disposition.

The COURT: We will take that this morning.

Mr. NATHANSON: This Defendant is the one Defendant who is in jail. I am not interested in the others.

The COURT: We will take the disposition of Mr. Liguori.

Mr. GRUNEWALD: This will be Count 3.

The COURT: Mr. Liguori, do I understand you want to change your plea with respect to Count 3?

Defendant LIGUORI: Yes.

The COURT: I want to advise you that you are entitled to a speedy and public trial, and to see and hear the evidence from the witnesses against you and you have the right to counsel throughout all stages of the proceeding.

Do you understand those rights?

Mr. LIGUORI: Yes.

The COURT: Do you understand that you are not required to prove your innocence and it is the duty of the Government to prove you guilty by competent evidence beyond a reasonable doubt, do you understand that?

Mr. LIGUORI: Yes.

The COURT: Have you told your attorney all the facts to which you now offer to plead guilty?

Mr. LIGUORI: I have.

The COURT: Were you involved in the charge to which you now intend to plead?

Mr. LIGUORI: Yes.

The COURT: Has he advised you of the charge against you and any possible defense you might have?

Mr. LIGUORI: Yes.

The COURT: Have you been advised of the penalties for the offense to which you now offer to plead guilty?

Mr. LIGUORI: Yes.

The COURT: What is it?

Mr. LIGUORI: I understand I can get two to ten years.

The COURT: Mr.——

Mr. GRUNEWALD: That is correct, your Honor. The maximum penalty is ten years and the minimum is two years.

The COURT: And there is a fine?

Mr. GRUNEWALD: I believe it to be $5,000.

The COURT: Do you understand that I can impose both, imprisonment and a fine?

Mr. LIGUORI: Yes.

The COURT: And it can run consecutively with the term you are serving?

Mr. LIGUORI: Yes.

The COURT: Have there been any threats made against you or any member of your family?

Mr. LIGUORI: There have not been.

The COURT: Has anyone made any promises of leniency to you to induce you to plead guilty?

Mr. LIGUORI: No, sir.

The COURT: Is your plea of guilty voluntarily made?

Mr. LIGUORI: Voluntary.

The COURT: Count 3 of the indictment reads as follows:

"On or about the 26th day of January, 1966, within the Eastern District of New York, the Defendant John A Liguori, the Defendant Henry Rosa, the Defendant Louis Custodio and the Defendant Eli Samuel Gonzalez, transferees required to pay the transfer tax imposed by Section 4741, Title 26, United States Code, knowingly and unlawfully acquired and ob-

tained approximately 23.361 kilograms of marijuana without having paid the transfer tax required by law. Title 26, United States Code, Section 4744(a) and Title 18, United States Code, Section 2."

Are you pleading guilty to this count because you are guilty?

Mr. LIGUORI: Yes.

The COURT: Do you know of any reason why the Court should not accept the plea?

Mr. NATHANSON: No.

The COURT: Are you presently under the care of a doctor?

Mr. LIGUORI: No.

The COURT: Are you taking any medicine or drugs regularly?

Mr. LIGUORI: No.

The COURT: Have you had psychiatric care of any kind?

Mr. LIGUORI: I have not.

The COURT: Counsel, have you advised the Defendant of any statements or confessions or any evidence the Government has against him?

Mr. NATHANSON: Yes.

The COURT: Is the Defendant pleading guilty because he is guilty?

Mr. NATHANSON: In my legal judgment, yes.

The COURT: Has the Defendant told you that he is taking any drugs that might affect his actions?

Mr. NATHANSON: No.

The COURT: Do you know of any reason why the Court should not accept the Defendant's plea of guilty?

Mr. NATHANSON: No.

The COURT: Are you satisfied with the representation of Mr. Nathanson in this case?

Mr. LIGUORI: Yes.

The COURT: I will take the plea on Count 3. You are pleading guilty to Count 3?

Mr. LIGUORI: Yes.

The COURT: The Court having observed the Defendant's demeanor while answering the questions and having been advised that the Defendant is not under the influence of any medicine or drugs, the Court finds that the offer to plead guilty of John A. Liguori to Count 3 of the indictment is free from any influence, is made voluntarily, with full knowledge of the consequences of his plea. There have been no promises made to you by any one and no threats of any kind, is that right?

Mr. LIGUORI: Yes.

The COURT: The matter is referred to the Probation Officer.

Mr. NATHANSON: Thank you, your Honor.

Mr. LIGUORI: Thank you, your Honor.

The COURT: This case is adjourned until the time of sentence, at which time, a disposition will be made of the remaining counts in the indictment.

U.S. GOVERNMENT PRINTING OFFICE: 1970